



## Evaluating the concept of immunity and recovery procedures under the OHADA uniform act: An appraisal of it's application in Anglophone Cameroon

Shashan Laisin Adela<sup>1</sup>, Nana Charles Nguindip<sup>2</sup>

<sup>1</sup> Assistant Lecturer, University of Yaounde II, Faculty of Laws and Political Science, Cameroon

<sup>2</sup> Senior Lecturer in Law, University of Dschang, Faculty of Laws and Political Sciences, Cameroon

### Abstract

The concept of immunity was not addressed by the Sheriffs and Civil Process Act with respect to enforcement of judgment. Notwithstanding, the concept of immunity was dealt with in the Petition of Rights Act Cap 149 of the Laws of the Federation of Nigeria 1958. This Act was a pre-1961 Statute and applied in Anglophone Cameroon by virtue of the fact that Cameroonian legislators had not legislated upon this issue of immunity. This was equally a statute that was enacted before the unification process in 1961. Before the coming into force of the Petition of Rights Act, issues concerning immunity against prosecution were governed by the common law. The maxim "*par in parem inparium non habet*" meaning an equal has no power over an equal, was the guiding principle in cases of diplomatic immunity. Even with this immunity put in place, its application becomes complex in commercial transaction especially in Anglophone Cameroon whose mode of operation in mostly Common Law in nature, and therefore rendering its enforcement difficult. This situation of applying recovery procedures which most of the time conflicts with English law principles has becomes worrisome in aspects of procedures as far business transactions are concerned, and thereby putting the OHADA Uniform Act in a questionable position.

**Keywords:** evaluating-immunity-recovery procedure-Ohada uniform act- Anglophone Cameroon

### Introduction

Under the OHADA Uniform Act the concept of immunity is dealt with in its article 30. Neither the Petition of Right Act nor the Uniform Act on Simplified Recovery Procedures and Measures of Execution defines the concept of immunity. However, immunity may be defined as any exemption from a duty, liability or service of process, especially an exemption granted to a public officer<sup>[1]</sup>. In the words of Edward Jkionka, immunity is a defense to a tort liability which is conferred upon an entire group or class of persons or entities under circumstances where consideration of public policy is thought to require special protection for the person, activity or entity in question of those injured by its tortious act. From a historical point, tort litigation against units of government, public officials and charities has been limited or prohibited on these bases<sup>[2]</sup>.

From this definition therefore, the basis of immunity against recovery proceedings is a consideration of public policy<sup>[3]</sup>. It is

important to consider public interest when dealing with authorities who represent public interest. The policies guiding such consideration should be laid down in order to avoid an abuse of the policy<sup>[4]</sup>.

The Uniform Act on Simplified Recovery Procedures and Measures of Execution lays down the principle of immunity against the recovery process in the following way. Compulsory distraint and preventive measures might not apply to any person enjoying immunity from execution<sup>[5]</sup>. It does not, however, state persons who enjoy this immunity against compulsory distraint and preventive measures. Article 30(2) of the same law lays down the exemption to the principle and only makes mention of public corporations and enterprises. Even the Petition of Rights Act limited this immunity to the government, Federal or State. Those provisions leave much to be desired<sup>[6]</sup>. However, some courts in Cameroon have tried to enumerate some people capable of

<sup>1</sup> www.mydictionary.com accessed on the 2/3/2017

<sup>2</sup> Kionka (E.G), tort in a nut shell, 2<sup>nd</sup> edition. 1992 p 341.c/f Black law dictionary. op cit.

<sup>3</sup> The trouble is that the concept of public has neither been defined at common law nor OHADA. Its determination is left at the whims and caprices of the courts of the various member states. A wrong use of the notion can cause irreparable damage to the creditor of an obligation under the judgment.

<sup>4</sup> The OHADA Uniform Act on Simplified Recovery procedures and Measures of Execution unlike previous legislations on immunity has laid down the exemption to the rule of immunity based on public policy. This can be seen in article 30(2) which states that any unquestionable debt due for payment belonging to public corporation or enterprise, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them subject to reciprocity. The CCJA further added weight to article 30

(2) in the case of *Aziabevi Yoyo Et Autres v. Societe Togo Telecom* (infra) by stating that once such a corporation has exposed itself to competition, it cannot benefit from article 30 (1)

<sup>5</sup> Ibid article 30(1) of the Uniform Act on SRPME

<sup>6</sup> The question may be asked to know whether apart from the state, government, public corporations and institutions, there are other authorities (individuals) who could benefit from such immunity. The answer is certainly in the positive. Law No.2006/022 of 29<sup>th</sup> Dec 2006 lays down the principle of vicarious liability of the state for acts committed by its public authorities in article 3. Where the authority is founded liable, the state compensates the victim and collect the money from the authority if need be. In this case, the judgment creditor cannot enforce his writ of execution against the individual but against the state which enjoys the immunity laid down in article 30(1) of the uniform Act on simplified recovery procedures

benefiting from this immunity<sup>[7]</sup>. That notwithstanding, the type of persons capable of enjoying immunity from recovery procedures can be referred from national and international instruments on immunities and privileges.

### 1. An overview of persons with special status in Simplified Recovery

The recovery of debt is purely a civil law thing. But in order to understand the concept of immunity properly, we have to go back to our criminal law notes<sup>[8]</sup>. Section 1 of Law No 65-LF-24 of 12 November 1965 and Law No 67 of 12<sup>th</sup> June 1967<sup>[9]</sup>. states that all persons shall be subject to the criminal law but that exceptions to this principles may be provided by the law alone.

The Penal Code equally states that the code and every provision shall be subject to the rules of international law and to all treaties duly promulgated, ratified and published<sup>[10]</sup>. The phrase 'international law' in this context refers to diplomatic immunity<sup>[11]</sup>. On the other hand, treaties signed and promulgated are to be found on the official gazette<sup>[12]</sup>. Immunity against the recovery process is not only limited to criminal proceedings, neither is it limited to diplomatic immunity. We have sovereign<sup>[13]</sup> immunity, immunity of state entities and immunity of some nationals.

#### 1.1. Sovereign immunity and simplified recovery procedures

A sovereign may be defined as a person, body or state, vested with independent and supreme authority<sup>[14]</sup>. with the sovereign state<sup>[15]</sup>. possessing an independent existence, being complete in itself, without being merely part of a larger whole to whose government it is subject. On the other hand, sovereign immunity is exemption from being sued in a person's own court or other courts without his consent<sup>[16]</sup>. Sovereign immunity is therefore associated with foreign sovereigns, sovereign states, governmental entities and authorities who enjoy such immunity. Foreign immunity was derived from rules of public international law, based on the maxim '*par in parem inparium non habet*.' This rule of public international law has become part of the English common law<sup>[17]</sup>.

and measures of execution. This is indirect immunity accorded the individuals who serve in the administration to enable them perform their functions properly.

<sup>7</sup> In case of *University of Ngaoundere v. Mindang Hyppolite*, Ord No.03 of 20th Dec 1999. Juridis periodic No 44 of October, November, December 2000. The Ngaoundere Court of First Instance held that the use of the word "personne" in article 30 (1) should be given a wider interpretation to include all public persons, the state, it decentralized territorial collectivities, public establishments and enterprises irrespective of their form and mission. The Douala court of first held a similar view in the case of *ONPC v S.F.I.* ord No 339 of 3 November 1998. Revue Camerounaise de l'arbitrage. July, August, September 2002. The court concerned itself with national immunity.

<sup>8</sup> Law No 2005/2007 of 27<sup>th</sup> July 2005 on the criminal procedure code in its article 61 states that a civil action can be made concurrently with a criminal action before the same court. Even where the criminal part discontinues the law provides that the civil trial can continue. And any judgment delivered in the claim is subject to execution and property can be seized under same.

<sup>9</sup> The Cameroonian Penal Code

<sup>10</sup> Ibid Section 2

<sup>11</sup> Ibid Section 2(1)

<sup>12</sup> Ibid section 2

<sup>13</sup> Sovereign is a characteristic of supreme authority. Sovereignty is a public international law concept and has two arms. Internal and external sovereignty. While external sovereignty is the power of dealing on a nation's behalf with other national governments, internal sovereignty is the power to enjoy by a government or sovereign state, including affairs within its own territory and powers related to the exercise of external sovereignty. Black's law dictionary op. cit. p. 1430

<sup>14</sup> Black's law dictionary loc.cit p 1430.

From its inception to 1978, there prevailed in England, the rule of absolute immunity. According to this rule, the foreign sovereign or sovereign state was granted immunity from all suits, irrespective of their nature<sup>[18]</sup>.

The Council of Europe sponsored a European Convention on state immunity which was concluded in 1972 and came into force in 1976. It restricted the scope of application of the doctrine of immunity. This restricted doctrine was given statutory recognition in England with the enactment of the State Immunity Act 1978<sup>[19]</sup>.

The State Immunity Act makes provisions for state immunity and this applies to a sovereign or other heads of states, members of his family, forming part of his house hold, his private servants as it applies the head of the diplomatic mission, to members of his family, forming part of his household, and to his private servants<sup>[20]</sup>.

Those who enjoy immunity from simplified recovery procedures under the Uniform Act are not clearly defined. Article 30 (2) only makes mention of public corporations and enterprises. It therefore leaves the determination of those who enjoy this immunity to the member state. This may lead to a disparity amongst the member states as to who should enjoy immunity from the recovery process.

Drawing from other international sources, the OHADA legislators should come out with a list of authorities or persons entitled to benefit from immunity against the recovery proceedings under the Uniform Act on Simplified Recovery Procedures and Measures of Execution.

By virtue of article 32(4), of the Diplomatic Immunity Act, a judgment against a person enjoying diplomatic immunity cannot be executed unless there has been a separate waiver of immunity from execution. This implies therefore that those who enjoy immunity from prosecution equally enjoy immunity from execution.

#### 1.2. Diplomatic immunity and the recovery process

The Vienna Convention on Diplomatic Relations 1961 is the international instrument that governs the concept of diplomatic

<sup>15</sup> Schemes for a common action in Europe have drawn states in to two kinds of organizations. Which may be termed inter-governmental or supra governmental. c/f Harvey and bather, the British constitution third edition at p. 553 intergovernmental organization, a European idea, found expression in 1949 when the council of Europe was created to achieve a greater unity of members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economics and social progress. This kind of organization on based on the principle that nations are sovereign states and that there should be no interference in their domestic affairs. The second kind of organization involves a transfer of some sovereignty to the multinational organization. It is this second option that has been adopted by OHADA.

<sup>16</sup> This might be true in the case of external sovereignty, but with internal sovereignty the consent of governmental entities and the authorities that enjoy this immunity may not be required. In Cameroon for example the prosecution of a member of parliament requires a fiat from the national assembly and not the consent of the members of parliament.

<sup>17</sup> *Mighell v Sultan of Johre(supra)*; *Development co. Ltd v Kelantan* (government) supra

<sup>18</sup> With an increase in the volume of commercial activities involving the state, a distinction was made between state and government act known as "*acta jure imperii*" meaning government acts on the one hand and "*acta jure genionis*" meaning commercial acts on the other hand. Given the distinction, state and sovereign immunity was accorded the acts of the second category not the first.

<sup>19</sup> The State Immunity Act being a post 1900 statute isn't applicable in Cameroon. Its mention is purely for academic purposes.

<sup>20</sup> State Immunity Act 1974, section 20

immunity. The concept was implemented in the United Kingdom by adopting the Diplomatic Privilege Act 1964<sup>[21]</sup>, which repealed the 1708 Act<sup>[22]</sup>. While immunity against criminal prosecution is absolute, that against civil prosecution is relative. Article 31 of the Diplomatic Privilege Act<sup>[23]</sup>, states that a diplomatic agent<sup>[24]</sup>, enjoys immunity from criminal prosecution and he is not obliged to give evidence in court as a witness.

With respect to the civil jurisdiction, a diplomatic agent enjoys immunity only in respect of official acts performed in the exercise of his function<sup>[25]</sup>. His immunity is subject to three exceptions<sup>[26]</sup>.

First, he will not avail himself of diplomatic immunity in an action relating to private immovable property, unless it is held on behalf of the sending state for the purpose of the mission<sup>[27]</sup>.

Secondly, diplomatic immunity would not be available to a diplomatic agent if the action relates to succession and to which he is involved as an executor, administrator or heir.

Thirdly, an act related to any professional or commercial activity pursued by the diplomatic agent outside his official activity is not covered<sup>[28]</sup>.

A person entitled to diplomatic immunity enjoys the same from the moment he enters the receiving state on condition that the receiving state has been notified by the sending state of the appointment and that the appointment has been accepted<sup>[29]</sup>.

Diplomatic immunity cannot be inferred from a unilateral action of the sending state<sup>[30]</sup>. However, if in any proceedings the question arises as to whether or not a person is entitled to immunity by virtue of the legislation concerned<sup>[31]</sup>, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question will amount to conclusive evidence of the fact<sup>[32]</sup>.

Diplomatic immunity extends to a diplomatic agent who is not accredited to a state, but who is passing through or is in a state, while proceeding to take up or to return to his post in some other state or returning to his country<sup>[33]</sup>.

All the privileges and immunities accorded a diplomatic agent are extended to the members of his family, who are of foreign nationality<sup>[34]</sup>. Members of the administrative staff, technical

staff and the service staff<sup>[35]</sup>, are immune from the civil jurisdiction only.

A diplomatic agent, member of the administrative and technical staff of a diplomatic mission and members of the service staff are all persons who enjoy diplomatic immunity from the civil jurisdiction and thus enjoy same from execution. Their properties cannot therefore be seized. Immunity from simplified recovery proceedings and execution is a very serious issue, but unfortunately, the OHADA legislators have paid very little attention to it. This can lead to untold hardship, as the application of the concept of immunity may be a matter of approximation.

### 1.3. State immunity and other public entities in the recovery process.

Before the coming into force of the Diplomatic Privilege Act 1964<sup>[36]</sup>, and the State Immunity Act 1978, the text that governed immunity in former Anglophone Cameroon was the Petition of Right Act, CAP 149 of the 1958 laws of the Federation of Nigeria<sup>[37]</sup>. By virtue of this Act, the various means of execution did not apply where the Government, Federal or State, was the judgment debtor. This was because in any proceeding where an order was made against the government, no execution there on could issue<sup>[38]</sup>. Rather, a copy of such judgment is sent to the Attorney General of the state<sup>[39]</sup>.

Simplified recovery procedures and methods of execution<sup>[40]</sup>, are available to the government or any government entity as a judgment creditor. The Petition of Right Act<sup>[41]</sup>, accorded absolute immunity to the entities mentioned therein. With the coming into force of the Uniform Act on Simplified Recovery Procedures and Measures of Execution, the rigors of section 7 of the Petition of Right Act<sup>[42]</sup>, is watered down. The Uniform Act<sup>[43]</sup>, states the principle of immunity in article 30(1)<sup>[44]</sup>, but the effects are watered down in article 30(2)<sup>[45]</sup>.

Analyzing this provision of the Uniform Act on Simplified Recovery Procedures and Measures of Execution, read together with the provisions of the Petition of Right Act and other statutes<sup>[46]</sup>, the principle of immunity against the recovery process is accorded to moral persons of public law, heads of states, heads

<sup>21</sup> This Act does not equally apply in Anglophone Cameroon by virtue of section 11 of the SCHCL. However, it will be discussed in this work for academic purposes. Even if Cameroon the Vienna Convention, it has not come out with any piece of legislation on diplomatic immunity.

<sup>22</sup> Applicable in Cameroon since it is a pre-1900 statute.

<sup>23</sup> www.legislation.gov.uk, accessed on the 23/4/2017

<sup>24</sup> As per Black's law Dictionary, he is a national representative of one of the four categories: ambassadors, envoys and minister plenipotentiary, minister resident or accredited to the sovereign and charges d'affaires accredited to the minister of foreign affairs.

<sup>25</sup> Diplomatic Immunity Act 1964, article 38(1)

<sup>26</sup> Under the Uniform Act on Simplified Recovery Procedures and Measures of Execution, and following the interpretation given to article 30(2) in the case of *Aziblevi Yovo Et Autres c/ Societe Togo Telecom* (infra) the only exception is offered in a case where the entity enjoying immunity is involved in competitive business. This can lead to an abuse to the concept of immunity thus causing grave hard ship the victim.

<sup>27</sup> The Immunity Act 1978, section 16 (1) (b).

<sup>28</sup> Diplomatic Privilege Act 1964, article 31(1)

<sup>29</sup> Ibid article 39

<sup>30</sup> *R v Governor of Pentonville Prison, exp. No2.(1989)C.O.D. 446*

<sup>31</sup> Diplomatic Privilege Act 1964, section 4 common wealth secretariat act 1966, paragraph 9, consular relations acts 1968, section 11, international organization act, 1968, section 8

<sup>32</sup> *Engelke v musmann (1932) A.C 433*

<sup>33</sup> Diplomatic Privilege Act 1964 article 40

<sup>34</sup> Diplomatic Privilege Act article 37(1)

<sup>35</sup> A service staff of a diplomatic mission is a member of the domestic staff of that mission.

<sup>36</sup> www.legislation.gov.uk, 1964pds accessed on 14/08/2018

<sup>37</sup> After the coming into force of these acts, The Petition of Rights Act continued to apply since it was pre 1900 statute and the others were post 1900 statutes.

<sup>38</sup> Petition of Right Acts, section 7.

<sup>39</sup> If the judgment is for the payment of money, the attorney general concerned by warrant under his hand directs that the award be paid, and in the case of any other judgment, he takes such measures as may be necessary to cause the same to be carried in to effect, he may equally direct the filing of an appeal.

<sup>40</sup> www.ohada.org

<sup>41</sup> en.m.wikipedia.org, www.britania.com accessed on 14/08/2018

<sup>42</sup> www.britania.com accessed on 14/08/2018

<sup>43</sup> On SRPME

<sup>44</sup> Compulsory distraint and preventive measures shall not apply to persons enjoying immunity from execution. Compulsory distraint shall be available only to a creditor who can show an unquestionable debt due for immediate payment, subject to the provisions relating to the apprehension and claim of movables.

<sup>45</sup> However, any unquestionable debts due for payment belonging to public corporations or enterprises, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them, subject to reciprocity.

<sup>46</sup> Diplomatic Privilege Act and State Immunity Act.

of diplomatic missions as well as their families, forming part of their house hold and their private servants. We suggest that a piece of community legislation against prosecution and execution will be useful.

The CCJA has pronounced on the issue of immunity against the recovery process in the case of *Aziabevi Yovo et Autres v Societe Togo TELECOM* <sup>[47]</sup>. In this case, the ‘chambre social’ of the Court of Appeal in Lome delivered a judgment against Societe Togo TELECOM in the sum of 118.970.213 Francs CFA. In the course of enforcement, Aziabevi and others attached the accounts of Togo TELECOM with various financial institutions. Togo TELECOM petitioned the president of the Court of First Instance for the seizure to be set aside on the ground that article 30 of the Uniform Act on Simplified Recovery Procedures and Measures of Execution <sup>[48]</sup>, had been violated. The order setting aside this seizure was granted. Aziabevi and the others appealed to the Court of Appeal which confirmed the ruling of the Court of First Instance. Aziabevi then appealed to the CCJA.

In delivering judgment, the court ruled that article 30(1) <sup>[49]</sup> lays down the general principle of immunity against execution but slows down its strict application in article 30 (2) <sup>[50]</sup>. The court went further to add that, article 30 which does not lay down the list of precise persons benefiting from this immunity against execution, announces the general principle by virtue of which moral persons and public corporations benefit from immunity from execution by virtue of their status. That by virtue of article 30(1), having subjected themselves to competition, Togo TELECOM watered down the effects of article 30 (1) of the Uniform Act. That, Togo TELECOM figures amongst the companies against which the compensation contemplated in article 30 applies, but this does not deprive the immunity laid down in article 30 (1)

We can see that this provision is very much in line with the provisions of the State Immunity Act to the extent that immunity does not lie against actions relating to commercial activities performed out of the official transaction <sup>[51]</sup>.

Though the Petition of Right Act did not state any restrictions to the principle, it laid down the procedure to be adopted by the creditor of money or any obligation against the state <sup>[52]</sup>. This is what the OHADA legislators have failed to do. This leaves the creditor in a desperate situation which can lead to hardship. Equity cannot suffer a wrong to be without a remedy.

The restriction imposed by article 30(2) of the Uniform Act on Simplified Recovery Procedures and Measures of Execution brings in the principle of reciprocity of unquestionable debts against public corporations, regardless of their form and mission. This principle is laid down in article 30(2) of the Uniform Act on Simplified Recovery Procedures and Measures of Execution to

the effect that where there is any unquestionable debt due for payment belonging to public corporations or enterprises, regardless of their form and mission, it may equally be compensated with unquestionable debts due for payment, belonging to any person owing them subject to reciprocity <sup>[53]</sup>.

This provision stated by the CCJA waters down the effects of the principle of immunity laid down in article 30 (1) with respect to defined entities. These are public corporations and enterprises. Immunity from the recovery process is therefore not automatic; the CCJA ruled that with the procedure of compensation of debts applicable to public corporations and enterprises, the principle of immunity has been tempered with <sup>[54]</sup>. It follows therefore from the decision of the court that, where a public corporation or enterprises is rendered competitive, it may benefit from the principle of immunity but the effects will not be the same because it is open to the principle of compensation <sup>[55]</sup>. This restriction offered by the Uniform Act is not enough compared to that offered by international instruments. It is important for the OHADA legislators to examine the regime of property that may be subjected to seizure. A general clause of immunity may be dangerous.

Unquestionable debts within the ambit of article 30(2) are debts which arise from an acknowledgment by the said corporations or enterprises of the debts or writs enforceable on the territory of the state where the corporation and enterprise is based. We may then be tempted to know the reason for immunity against recovery.

#### 1.4. The rationale for immunity against the recovery proceedings and execution measures

The various texts that state the principle of immunity and its application do not give reasons for the application of the same. That notwithstanding, the following may be considered reasons for immunity against recovery proceedings.

The means of the state are always limited with respect to its obligations towards its citizens, the demands of the citizens towards the state are always many and inexhaustible, and the state is under an obligation to respond to such demand. Seizing property of the state can lead to the destabilization of the system which may disrupt the plans and functioning of the state.

The state always represents public interest, so, where public interest and private interest conflict, public interest prevails <sup>[56]</sup>.

State property is property of common interest; seizing state property will amount to meddling with common interest which may lead to cessation of activity.

With respect to sovereign immunity, any violation is tantamount to a violation of the sovereignty <sup>[57]</sup>, of the state or authority in

<sup>47</sup> Arrêt No 044/2005 of 7<sup>th</sup> July 2005, p.29

<sup>48</sup> www.ohada.org

<sup>49</sup> Article 30: Compulsory dstraint and preventive measures shall not apply to persons enjoying immunity from execution.

<sup>50</sup> However, any unquestionable debts due for payment belonging to public corporations or enterprises, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them, subject to reciprocity.

<sup>51</sup> Section 16(1) b

<sup>52</sup> The judgment is taken by the creditor to the attorney of the federation who may order the payment of the same or order that an appeal be filed against the judgment.

<sup>53</sup> www.ohada.org accessed 14/08/2018

<sup>54</sup> *Aziabevi Yovo et Autres v Societe Togo TELECOM*. Arrêt No 044/2005/2005 of 7<sup>th</sup> July 2005, recueil de jurisprudence semestriel no 6 Jul-Dec 2005, p 29

<sup>55</sup> This restriction offered by the Uniform Act is not enough compared to that offered by international instruments. It is important for the OHADA legislators to examine the regime of property that may be subjected to seizure. A general clause of immunity may be dangerous.

<sup>56</sup> The prestige of national political institutions have been strengthened. Not only do people make unprecedented demands on their governments for protection, material prosperity and welfare services but through improvements in communications and the development of modern administrative and statistical techniques ; governments are better placed to satisfy the community's need. c/f Harvey and Bather the British constitution, 3<sup>rd</sup> edition.

<sup>57</sup> The general principle of immunity posed in article 30 of The Uniform Act on Simplified Recovery Procedures And Measures of Execution was recently

question<sup>[58]</sup>. Immunity of the state protects the state<sup>[59]</sup>, against the possibility of getting into a situation in which it will be impossible for it to accomplish its mission of public service as a result of a seizure<sup>[60]</sup>.

One other reason for immunity against the recovery process may be that, the concept violates the fundamental principle of equality before the law. Of what essence is it to obtain a judgment when same cannot be enforced because its enforceability is limited by a concept?

The Petition of Right Act directed what had to be done with a judgment in a case where the judgment debtor was immune from proceedings by virtue of the law. The OHADA legislators have failed to do so. They only state the principle.

We suggest that a procedure for the enforcement of judgment against such debtors be adopted by the OHADA legislators taking inspiration from the Petition of Right Act.

### 1.5. Waive<sup>[61]</sup> of immunity and simplified recovery procedures

The immunity accorded a diplomatic agent does not belong to him personally. It is the property of the state that accredited him with. Hence, the rule is that in the case of proceedings against the diplomatic mission, a waiver may be granted by the sending state. Waiver by the head of the diplomatic mission or by any person for the time being performing his functions is deemed to be waiver of the sending state<sup>[62]</sup>. A state can also waive its immunity against recovery.

By virtue of article 32(2)<sup>[63]</sup>, waiver must always be express. A country can state in the convention that it will not invoke any right of immunity from the recovery process<sup>[64]</sup>. On the other hand, a country can consent to any act of forced recovery against it in a loan agreement<sup>[65]</sup>. However, a person enjoying immunity from jurisdiction may initiate proceedings. The action precludes him from invoking immunity in respect of any counter claim directly connected with the principal claim<sup>[66]</sup>. Waiver can therefore be implied with respect to a counter claim before the court. This waiver does not imply that, the immunity from recovery has equally been waived. These are two different proceedings that require two distinct waivers.

### Conclusion

Neither the Petition of Rights Act nor the Uniform Act on Simplified Recovery Procedures and Measures of Execution provides for waiver of immunity from recovery. This creates a loophole in the law that needs to be mended drawing inference from available international legislation. This will go a long way

to facilitate recovery procedures because the present situation renders more difficult the recovery of debt.

### References

1. www.mydictionary.com accessed on the 2/3/2017.
2. Kionka (E.G), tort in a nut shell, 2<sup>nd</sup> edition, 1992 pp. 341.c/f Black law dictionary. op cit.
3. The trouble is that the concept of public has neither been defined at common law nor OHADA. Its determination is left at the whims and caprices of the courts of the various member states. A wrong use of the notion can cause irreparable damage to the creditor of an obligation under the judgment.
4. The OHADA Uniform Act on Simplified Recovery procedures and Measures of Execution unlike previous legislations on immunity has laid down the exemption to the rule of immunity based on public policy. This can be seen in article 30(2) which states that any unquestionable debt due for payment belonging to public corporation or enterprise, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them subject to reciprocity. The CCJA further added weight to article 30 (2) in the case of *Aziabevi Yovo Et Autres v.Societe Togo Telecom* (infra) by stating that once such a corporation has exposed itself to competition, it cannot benefit from article, 30(1).
5. Ibid article 30(1) of the Uniform Act on SRPME
6. The question may be asked to know whether apart from the state, government, public corporations and institutions, there are other authorities (individuals) who could benefit from such immunity. The answer is certainly in the positive. Law No.2006/o22 of 29<sup>th</sup> Dec 2006 lays down the principle of vicarious liability of the state for acts committed by its public authorities in article 3. Where the authority is founded liable, the state compensates the victim and collect the money from the authority if need be. In this case, the judgment creditor cannot enforce his writ of execution against the individual but against the state which enjoys the immunity laid down in article 30(1) of the uniform Act on simplified recovery procedures and measures of execution. This is indirect immunity accorded the individuals who serve in the administration to enable them perform their functions properly.
7. In case of *University of Ngaoundere v. Mindang Hyppolite*, Ord No.03 of 20<sup>th</sup> Dec 1999. *Juridis* periodic No 44 of October, November, December 2000. The Ngaoundere Court of First Instance held that the use of the word *personne*

reaffirmed by the United Nation Convention On Jurisdictional Immunities Of State And Their Properties, adopted by the plenary assembly of the United Nations on 2<sup>nd</sup> dec 2004 and opened for signature by the states on 17<sup>th</sup> January 2005 to 17<sup>th</sup> January 2007 through the press communiqué of the General Assembly. GA/10309 of 2<sup>nd</sup> Dec 2004, kenfack (DG) in propos sur l'immunité de l'exécution et les émanations des états. Is of the opinion that the United Nations convention is justified by the necessity to safeguard the sovereignty of the state.

<sup>58</sup> This can only be true in the case of inter-governmental organizations. But where the state has surrendered part of its sovereignty, to a supra national structure as in the case of the OHADA, the sovereignty in this case cannot be absolute;

<sup>59</sup> This immunity is not limited to the state, the state sometimes accomplishes its mission of public service by creating structures, public enterprises or companies to accomplish the same. kenfack {DG} says these entities also benefit from immunity against recovery.

<sup>60</sup> Ibid

<sup>61</sup> A waiver is the voluntary relinquishment or surrender of some known right or privilege. [http:// En.m.wikipedia.org](http://En.m.wikipedia.org)

<sup>62</sup> Vienna Convention On Diplomatic Relations, article 32, Diplomatic Privilege Act 1964, section 2,(3).the effect of this is that the head of a diplomatic mission may waiver not only the privilege of the subordinate member of his staff but his own as well.

<sup>63</sup> Vienna Convention On Diplomatic Relations. [www.britannica.com](http://www.britannica.com), [www.researchgate.net](http://www.researchgate.net)

<sup>64</sup> Arret Noga, CA Paris, 10 august 2000

<sup>65</sup> This was the case of the loan agreement between Cameroon and Midland Bank which was the subject of arret of 26 September, 2001 and 22 January 2004 of the Paris Court of Appeal.

<sup>66</sup> Vienna Convention on Diplomatic Relations, article 32(3)

- in article 30 (1) should be given a wider interpretation to include all public persons, the state, its decentralized territorial collectivities, public establishments and enterprises irrespective of their form and mission. The Douala court of first held a similar view in the case of *ONPC v S.F.I.* ord No 339 of 3 November 1998. *Revue Camerounaise de l'arbitrage*. July, August, September the court concerned itself with national immunity, 2002.
8. Law No 2005/2007 of 27<sup>th</sup> July 2005 on the criminal procedure code in its article 61 states that a civil action can be made concurrently with a criminal action before the same court. Even where the criminal part discontinues the law provides that the civil trial can continue. And any judgment delivered in the claim is subject to execution and property can be seized under same.
  9. The Cameroonian Penal Code
  10. Ibid Section 2
  11. Ibid Section 2(1)
  12. Ibid section 2
  13. Sovereign is a characteristic of supreme authority. Sovereignty is a public international law concept and has two arms. Internal and external sovereignty. While external sovereignty is the power of dealing on a nation's behalf with other national governments, internal sovereignty is the power to enjoy by a government or sovereign state, including affairs within its own territory and powers related to the exercise of external sovereignty. Black's law dictionary op. CIT. p. 1430
  14. Black's law dictionary loc. cit p 1430.
  15. Schemes for a common action in Europe have drawn states in to two kinds of organizations. Which may be termed inter-governmental or supra governmental. c/f Harvey and Bather, the British constitution third edition at p. 553 intergovernmental organization, a European idea, found expression in 1949 when the council of Europe was created to achieve a greater unity of members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economics and social progress. This kind of organization is based on the principle that nations are sovereign states and that there should be no interference in their domestic affairs. The second kind of organization involves a transfer of some sovereignty to the multinational organization. It is this second option that has been adopted by OHADA.
  16. This might be true in the case of external sovereignty, but with internal sovereignty the consent of governmental entities and the authorities that enjoy this immunity may not be required. In Cameroon for example the prosecution of a member of parliament requires a fiat from the national assembly and not the consent of the members of parliament.
  17. *Mighell v Sultan of Johore* (supra); *Development co. Ltd v Kelantan* (government) supra
  18. With an increase in the volume of commercial activities involving the state, a distinction was made between state and government acts known as "*acta jure imperii*" meaning government acts on the one hand and "*acta jure gestionis*" meaning commercial acts on the other hand. Given the distinction, state and sovereign immunity was accorded the acts of the second category not the first.
  19. The State Immunity Act being a post 1900 statute isn't applicable in Cameroon. Its mention is purely for academic purposes.
  20. State Immunity Act 1974, section 20
  21. This Act does not equally apply in Anglophone Cameroon by virtue of section 11 of the SCHCL. However, it will be discussed in this work for academic purposes. Even if Cameroon the Vienna Convention, it has not come out with any piece of legislation on diplomatic immunity.
  22. Applicable in Cameroon since it is a pre-1900 statute.
  23. [www.legislation.gov.uk](http://www.legislation.gov.uk). accessed on the 23/4/2017
  24. As per Black's law Dictionary, he is a national representative of one of the four categories: ambassadors, envoys and minister plenipotentiary, minister resident or accredited to the sovereign and charges d'affaires accredited to the minister of foreign affairs.
  25. Diplomatic Immunity Act, article, 1964, 38(1).
  26. Under the Uniform Act on Simplified Recovery Procedures and Measures of Execution, and following the interpretation given to article 30(2) in the case of *Aziblevi Yovo Et Autres c/ Societe Togo Telecom* (infra) the only exception is offered in a case where the entity enjoying immunity is involved in competitive business. This can lead to an abuse to the concept of immunity thus causing grave harm to the victim.
  27. The Immunity Act 1978, section 16 (1) (b).
  28. Diplomatic Privilege Act 1964, article 31(1)
  29. Ibid article 39
  30. *R v Governor of Pentonville Prison, ex p. No2*. (1989) C.O.D. 446
  31. Diplomatic Privilege Act 1964, section 4 common wealth secretariat act 1966, paragraph 9, consular relations acts 1968, section 11, international organization act, 1968, section 8
  32. *Engelke v musmann* (1932) A.C 433
  33. Diplomatic Privilege Act 1964 article 40
  34. Diplomatic Privilege Act article 37(1)
  35. A service staff of a diplomatic mission is a member of the domestic staff of that mission.
  36. [www.legislation.gov.uk](http://www.legislation.gov.uk), 1964pds accessed on 14/08/2018
  37. After the coming into force of these acts, The Petition of Rights Act continued to apply since it was pre 1900 statute and the others were post 1900 statutes.
  38. Petition of Rights Acts, section 7.
  39. If the judgment is for the payment of money, the attorney general concerned by warrant under his hand directs that the award be paid, and in the case of any other judgment, he takes such measures as may be necessary to cause the same to be carried into effect, he may equally direct the filing of an appeal.
  40. [www.ohada.org](http://www.ohada.org)
  41. [en.m.wikipedia.org](http://en.m.wikipedia.org), [www.britania.com](http://www.britania.com) accessed on 14/08/2018
  42. [www.britania.com](http://www.britania.com) accessed on 14/08/2018
  43. On SRPME
  44. Compulsory distraint and preventive measures shall not apply to persons enjoying immunity from execution. Compulsory distraint shall be available only to a creditor who can show an unquestionable debt due for immediate payment, subject to the provisions relating to the apprehension and claim of movables.

45. However, any unquestionable debts due for payment belonging to public corporations or enterprises, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them, subject to reciprocity.
46. Diplomatic Privilege Act and State Immunity Act.
47. Arrêt No 044/2005 of 7<sup>th</sup> July 2005, p.29
48. www.ohada.org
49. Article 30: Compulsory distraint and preventive measures shall not apply to persons enjoying immunity from execution.
50. However, any unquestionable debts due for payment belonging to public corporations or enterprises, regardless of their form and mission, may equally be compensated with unquestionable debts due for payment belonging to any person owing them, subject to reciprocity.
51. Section 16(1) b
52. The judgment is taken by the creditor to the attorney of the federation who may order the payment of the same or order that an appeal be filed against the judgment.
53. www.ohada.org accessed 14/08/2018
54. Azieblevi Yovo et Autres v Societe Togo TELECOM. Arrêt No 044/2005;2005 of 7<sup>th</sup> July 2005, recueil de jurisprudence semestriel no 6 Jul-Dec 2005, p 29
55. This restriction offered by the Uniform Act is not enough compared to that offered by international instruments. It is important for the OHADA legislators to examine the regime of property that may be subjected to seizure. A general clause of immunity may be dangerous.
56. The prestige of national political institutions have been strengthened. Not only do people make unprecedented demands on their governments for protection, material prosperity and welfare services but through improvements in communications and the development of modern administrative and statistical techniques ; governments are better placed to satisfy the community's need. c/f Harvey and Bather the British constitution, 3<sup>rd</sup> edition.
57. The general principle of immunity posed in article 30 of The Uniform Act on Simplified Recovery Procedures And Measures of Execution was recently reaffirmed by the United Nations Convention On Jurisdictional Immunities Of State And Their Properties, adopted by the plenary assembly of the United Nations on 2<sup>nd</sup> dec 2004 and opened for signature by the states on 17<sup>th</sup> January 2005 to 17<sup>th</sup> January 2007 through the press communiqué of the General Assembly. GA/10309 of 2<sup>nd</sup> Dec 2004, kenfack (DG) in propos sur l'immunité de l'exécution et les émanations des états. Is of the opinion that the United Nations convention is justified by the necessity to safeguard the sovereignty of the state.
58. This can only be true in the case of inter-governmental organizations. But where the state has surrendered part of its sovereignty, to a supra national structure as in the case of the OHADA, the sovereignty in this case cannot be absolute;
59. This immunity is not limited to the state, the state sometimes accomplishes its mission of public service by creating structures, public enterprises or companies to accomplish the same. kenfack {DG} says these entities also benefit from immunity against recovery.
60. Ibid
61. A waiver is the voluntary relinquishment or surrender of some known right or privilege. [http:// En.m.wikipedia.org](http://En.m.wikipedia.org)
62. Vienna Convention On Diplomatic Relations, article 32, Diplomatic Privilege Act 1964, section 2,(3).the effect of this is that the head of a diplomatic mission may waive not only the privilege of the subordinate member of his staff but his own as well.
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66. Vienna Convention on Diplomatic Relations, article 32(3)